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fluctuates with the receipts of the corporation to which it contributes. A state may, therefore, levy a tax upon the property, within its borders, of a foreign corporation, although the amount of the tax is dependent upon the gross receipts of the corporation within the state, it being considered that the gross receipts, in such case, are simply an index, or measure, of the value of the property.¹⁸ Although the rule is clear, it is often difficult, as a practical matter, to distinguish the two forms of tax; but where, from the facts, the court is convinced, in any particular case, that the state is attempting to tax the gross receipts of a foreign corporation engaged in interstate commerce, under the guise of a tax upon its property, it will declare the tax illegal. The recent decisions of the Supreme Court indicate a pronounced tendency on the part of the court to look behind forms and to ascertain what was the real intention of the state in assessing the tax, and upon what the tax operates as a matter of fact, rather than to formulate any stereotyped rules to govern all cases. If the tax is, in effect, an indiscriminatory property tax, it will be upheld, though in the form of a tax on gross receipts; while on the other hand, if, in effect, it is a tax on the gross receipts derived from interstate commerce, or on the privilege of engaging in interstate commerce within the state, it will be repudiated.¹⁹

E. L. H.

INSURANCE—RIGHT OF BENEFICIARY—TERMINATION OF CONTINGENT RIGHT OF CHILD—IS BENEFICIARY'S RIGHT TESTAMENTARY OR CONTRACTUAL?—It is a common proviso in a policy of life insurance payable to the wife of the insured, that in the event of her death before the insured, it shall be payable to her children. Where the contingency occurs, by the death of the wife before the insured, in which children does the interest vest? Does it vest in all those living at the time the policy is issued; that is to say, are the representatives of a child who has predeceased the mother entitled to share; or does it vest solely in those surviving the mother? If there are three children living at the date of issuance of a policy containing such a clause and one child dies, followed by the death of the mother, are the proceeds divisible between the two surviving children or will the issue or personal representative of the deceased child be entitled to a share? Two distinct lines of cases are found in the reports construing such policies of insurance. One line

¹⁸ *Maine v. Grand Trunk Co.*, 142 U. S. 217 (1891); *Postal Tel. Co. v. Adams*, 155 U. S. 688 (1895); *U. S. Expr. v. Minn.*, 223 U. S. 335 (1912); *Baltic Mining Co. v. Mass.*, 231 U. S. 68 (1913).

¹⁹ *Galveston, etc., Rwy. Co. v. Texas*, 210 U. S. 217 (1908); *U. S. Expr. Co. v. Minn.*, 223 U. S. 335 (1912); *Baltic Mining Co. v. Mass.*, 231 U. S. 68 (1913); *Kansas City Rwy. v. Kans.*, 240 U. S. 227 (1916).

follows what may be called the Connecticut view, while the other line stands for what may be designated as the New York view.¹

The Connecticut rule holds that upon the issuance of the policy a transmissible interest immediately vests in the children, and that if a child should die before the insured and then the wife should likewise predecease the insured, the interest of the deceased child would continue and pass by descent.² The process of reasoning which leads to this conclusion is based upon the proposition that a policy of insurance is testamentary in its nature and character and should be so construed. When considered with respect to the rights of those who claim to be beneficiaries, it should be regarded in the light of a testamentary provision rather than of a contract.³ Upon the death of the mother before the assured her interest is extinguished and the contract of insurance stands between the company and the children as though she had never been a party to it. It is said that "the right of the children is more than a mere expectancy or naked possibility. It is a possibility coupled with an interest, which is transmissible to the heirs of the children."⁴

On the other hand, if the policy of insurance is to be regarded purely as a contract between the parties to the same, a different conclusion naturally follows, and in this lies the principal reason for the diversity of opinion on the part of the courts. Such is the New York rule, which holds that only those of the children as survive the mother can take, and the issue or personal representatives of a child who dies before her are excluded.⁵ The rules which obtain regarding the vesting of estates created by will have no application, for a will is in no sense a contract and an insurance policy is. It should therefore be construed in accordance with the rules applicable to ordinary contracts. The child has simply a contingent interest in the property which was defeated by its death prior to that of the mother, and so no interest was transmitted either to its issue or personal representative. Upon the death of the mother, all interest in the policy vests immediately in the children then living.

¹ Richards, Insurance (3d Ed.), Sec. 67.

² Continental Insurance Co. v. Palmer, 42 Conn. 60 (1875); *In re Estate of Conrad*, 89 Iowa 396 (1893); Robinson v. Duvall, 79 Ky. 83 (1880); Voss v. Connecticut, *etc.*, Ins. Co., 119 Mich. 161 (1899); Michigan Mutual, *etc.*, Co. v. Basler, 140 Mich. 233 (1905); Glenn v. Burns, 100 Tenn. 292 (1897).

³ Robinson v. Duvall, *supra*.

⁴ Voss v. Connecticut, *etc.*, Ins. Co., *supra*.

⁵ Lerch v. Freutel, 36 N. Y. Misc. 581 (1901); U. S. Trust Co. v. Mutual Benefit Life Ins. Co., 115 N. Y. 152 (1889); Walsh v. Mutual Life Ins. Co., 133 N. Y. 408 (1892); Davis v. N. Y. Life Ins. Co., 212 Mass. 310 (1912); Winsor v. Odd Fellows, *etc.*, Ass'n, 13 R. I. 149 (1880); Continental Life Ins. Co. v. Webb, 54 Ala. 688 (1875); Elgar v. Equitable, *etc.*, Co., 113 Wis. 90 (1902); Fidelity Trust Co. v. Marshall, 178 N. Y. 468 (1904); Succession of Roder, 121 La. 692 (1908).

In a recent case in Indiana, *Burnett v. Mutual Life Insurance Company*,⁶ the problem arose for the first time before that court, and the so-called New York rule was applied. Neither the issue nor the personal representatives of a child who had predeceased its mother were entitled to any interest in the proceeds of the policy, but the whole vested in the children surviving at the death of the mother.⁷

The basis of the difference in the courts is between the rules governing where a contractual relation exists between the parties and those principles applicable to a case relating to the vesting of an estate created by a will. Under the New York view that the beneficiary's right is merely contractual, "children" is given its ordinary meaning; while under the Connecticut view that the right is testamentary and that the interest which vests in the children immediately upon the issuance of the policy is such as to be transmitted by the law of descent, "children" is made to include "grandchildren." It is true that in a certain sense, upon the issuance of the policy, an interest in, or right to, its continuance as an obligation does vest or, more properly, inure to the children. But it is submitted that it does not vest in the technical sense of the term as it is used in connection with estates created under testamentary devises. Properly, it seems to be a right of no higher quality than that it will be protected in favor of the children so long as there is a possibility of it eventually inuring to their benefit. While such a provision as here under consideration partakes of a testamentary nature in that it is to take effect after the death of the insured, it is after all purely a contract between the insured and the insurance company, and as such the beneficiary is seeking to enforce it. Greater strictness is

⁶ 114 N. E. 234 (Ind. 1916).

⁷ Such a provision in a life policy and involving the exact state of facts under consideration here, has not as yet been passed upon by a court of last resort in Pennsylvania. In *Brown's Appeal*, 125 Pa. 303 (1889), and *Entwistle v. Travelers Ins. Co.*, 202 Pa. 141 (1902), the policies contained such a clause, but the children were all alive at the time of the death of the mother. The Supreme Court indicated that they viewed this clause as a contract to be construed as such and not as a testamentary disposition. The exact state of facts arose in *Estate of Thorne*, 50 Pittsburgh L. J. 233 (1903), where there were three children living at date of issuance of the policy, but one predeceased the mother. The Allegheny County Court held that the deceased child had a contingent interest which passed to his administrator and became absolute by the death of his mother. Another lower court decision, and the latest in which this question was involved, is *Braddock v. Manhattan Life Ins. Co.*, 16 Pa. Dist. R. 127 (1906). Judge (now Justice) Von Moschzisker, after analyzing the New York and the Connecticut rule and showing that the question was still an open one in Pennsylvania, concluded that the heirs of the child who had predeceased its mother, were not entitled. There being no other children, the proceeds of the policy were payable to the personal representatives of the mother. The court accepted the New York rule and apparently had no knowledge of the Pittsburgh case decided three years before. The decision was not appealed from.

properly required in the construction of the terms of a contract, which have been chosen after negotiations and consideration of their effect by the parties and which are presumed to correctly describe their rights and liabilities; whereas in a will, which is solely the expression of the testator's intention, a more liberal rule of construction is adopted in order to prevent the defeat of his purposes. There is nothing in the contract of insurance as such, which would warrant a court in giving to the word "children" any other than its ordinary meaning. So interpreted, it excludes grandchildren—that is to say, children of a child who has predeceased its mother, the primary beneficiary, and necessarily leads to the conclusion that only those children take who survive their mother. Under this kind of insurance clause, where the aim is to protect the wife and children after the death of the insured, it seems more consonant with reason to say that when the contractual relation with the mother ceases by her death, they who were her children at this moment are the only ones whom it is intended to protect and should be the only ones to assert and enforce an interest as substituted parties in the place of their mother.

P. H. R.

PROPERTY—WILLS—DEPENDENT RELATIVE REVOCATION—GIFTS TO CHARITIES—The doctrine of dependent relative revocation of wills is one which from its very nature involves many difficulties in application. It is not surprising, therefore, that the cases show a great amount of uncertainty and of inconsistency. Arising, as it did, in the Court of Chancery at a comparatively early period,¹ this doctrine has exerted a profound influence on the courts both of England and of this country, and, while the tendency, particularly in the American courts, has been to limit its application as narrowly as possible without departing from established authority, still the doctrine vigorously persists. Stated broadly, the doctrine may be said to be, that where a testator revokes a will, wholly or in part, in reliance on a supposed state of facts and those facts are really non-existent, the revocation is inoperative because it was conditioned upon the existence of the supposed facts.

A recent case illustrating the tendency of the courts to restrict the operation of the doctrine is that of *Ely v. Megie*,² where the New York court refused to apply it. In that case the testator had by a codicil in 1909 left the residue of his estate to be divided among eight charitable associations. In 1911 he executed a second codicil, wherein he in terms revoked that part of the codicil of 1909, and substituted therefor, *inter alia*, bequests of \$100,000 each to four of the original eight legatees, these legacies being expressly subject to

¹ *Onions v. Tyrer*, 2 Vern. 742 (1717).

² *Ely v. Megie*, 219 N. Y. 112, 113 N. E. 800 (1916).